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Online Dispute Resolution: Justice without the State?

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ONLINE DISPUTE RESOLUTION: JUSTICE WITHOUT THE STATE?*

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I. Jurisdiction and Territorial Borders

Ever since the emergence of nation states, the exercise of judicial, prescriptive and enforcement jurisdiction has been closely-linked to the concept of territoriality and a simple (if not simplistic) syllogism reveals the reason for this nexus: the assertion of jurisdiction is an expression of state sovereignty; territoriality is an indispensable ingredient of state sovereignty; hence, jurisdiction must be closely related to, if not anchored in, territoriality. This finding, already inherent in Ulrich Huber's Seventeenth century *De Conflictu Legum Diversarum in Diversis Imperiis*,[1] and introduced to the jurisprudence of the United States by Justice Story in a Supreme Court decision more than 180 years ago,[2] produced at least two rules: first, every state may exercise control over persons, things and conduct within its territory; and second, no state has such regulatory power over persons, things and conduct outside its territory.

In times when geographical space, distance and borders limited human activity, these rules were perceived as both workable and, for the most part, legitimate.[3] As territorial boundaries lost in significance, however, this perception changed. With markets no longer confined to national borders and with foreign conduct affecting local interests, jurisdictional rules premised on the concept of territoriality have been increasingly criticised as providing neither workable nor fair solutions.

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* This paper is a revised and updated version of a book chapter entitled "Jurisdiction in Cyberspace" in: "Beyond Territoriality" edited by Günther Handl, Joachim Zekoll, Peer Zumbansen (Leiden, Boston, Martinus Nijhoff Publishers, 2012, pp. 341-369).

1 See Ernest G Lorenzen, "*Huber*'s De Conflictu Legum", in: Albert Kocourek (ed), *Celebration Legal Essays, To Mark the Twenty-fifth Year of Service of John H. Wigmore*, (Chicago IL, Northwestern University Press, 1919), p 199, at 200.

2 The Apollon, 22 US (9 Wheat.), p 362, at 370 (1824): "The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens."

3 They were never absolute. See "The Case of the SS Lotus – France v. Turkey", (1927) PCIJ Reports, Series A, No. 10, in which the Permanent Court of International Justice held that a state may sanction a person's conduct who acted abroad but produced local injury. The text is also available at: http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm.

With the advent of the Internet, even more fundamental doubts arose about the wisdom of traditional jurisdictional thinking. These doubts were premised on the assumption that cyberspace is an idiosyncratic space, not susceptible to outside regulation. As a consequence, normativity would, instead, evolve within a de-centralised system of self-government, based upon a pure contract theory of law-making.[4] Even observers not associated with this libertarian approach initially argued that any attempt to adapt the existing jurisdictional models to this medium would inevitably fail because the theoretical foundation itself, *i.e.*, the territory-(state-) based concept, is inapt to capture and adequately resolve the jurisdictional questions that occur in the Internet environment.[5]

Of the many jurisdictional facets of cyberlaw, which these considerations may affect, this paper will examine the evolution of norms through private ordering in the commercial Internet environment. It has been argued that this environment is fertile ground for the evolution of transnational legal regimes which are largely independent of state input and control.[6] We will first test the validity of this assertion by exploring the rules governing transactions and dispute resolution mechanisms on "eBay," the single most important online trading platform (Section II). The second substantive part of this paper (Section III) will address a peculiar public-private arrangement between the *Internet Corporation for Assigned Name and Numbers* (ICANN) and the United States Government. That arrangement yielded, among other things, a widely-used online dispute-resolution procedure as well as substantive rules applied by private entities in disputes over the misappropriation of trademarks through domain-name users. The claim that this dispute-resolution regime presents a paradigmatic example for the emergence of one of a multitude of jurisdictional spaces, de-coupled from, or only loosely connected to, traditional state (territorial) authority,[7] merits further investigation.

II. Online Community Norms – eBay "Law"

Predicting the emergence of law through self-governance in cyberspace, the early protagonists foresaw that the development of the Internet would proceed in line with the Jeffersonian idea of a de-centralised system of self-government. This system would consist of small independent units, and would reflect, in many ways, a pure public-choice approach: consum-

4 David R Johnson & David G Post, "Law and Borders - The Rise of Law in Cyberspace", (1996) 48 *Stanford Law Review*, p 1367.

5 Ralf Michaels, *Territorial Jurisdiction after Territoriality, in: Globalisation and Jurisdiction*, edited by Piet Jan Slot & Mielle Bultermann, (Leiden, Kluwer Law, 2004), p 120.

6 Thomas Schultz, "Carving up the Internet: Jurisdiction, Legal Orders, and the Private/Public International Law Interface", (2008) 19 *European Journal of International Law*, p 799, at 829 *et seq*.

7 See, for example, Andreas Fischer-Lescano & Gunther Teubner, "Fragmentierung des Weltrechts: Vernetzung globaler Regimes statt etatistischer Rechtseinheit", p 16 *et seq*., available at: http://www.velbrueck-wissenschaft.de/pdfs/2005_fischer-lescanoteubner.pdf. (2005).

ers would determine directly by their behaviour which rules will become relevant binding Internet-norms and which will not. It would have been the libertarian dream: *finalmente*, a space without government. By pointing to the online network of *Second Life* as illustration of the reality of virtual space, David Post elaborated upon this theme as late as 2008.[8] For this purpose, he even invoked the notion of self-governing online communities, "with shared norms and customs and expectations characteristic of each [community]".[9] These communities, Post concluded, should not be "inherently less deserving of less [*sic*!] respect than the other communities - Topeka, Kansas, say, or Leicester, UK, or Sri Lanka - within the international legal order".[10] Contrary to these assumptions, this development did not, and probably will not, occur in the many areas in which states remain the central stakeholders and continue to dominate the rule-making and rule-enforcing processes. Disputes arising out of Internet activities remain, for the most part, governed by traditional, state-based jurisdictional forces. This is particularly true for transnational conflicts of public laws, such as the clash of American free-speech concerns and other nations' emphasis on competing basic rights. Strongly-held value-judgments are likely to prevent the emergence of transnational (or community-based) legal authority in both this field and beyond.[11]

However, there are approaches which address the evolution of legal norms within non-state communities in less generalising and more analytical ways than Post's account. One leading example is the focus upon the notion of geographically-independent communities as the fountainhead of jurisdictional rules. Paul Schiff Berman was among the first who articulated a community-based concept for jurisdictional purposes, premised on what he calls a cosmopolitan approach which "allows us to think of community not as a geographically determined territory circumscribed by fixed boundaries but as 'articulated moments in networks of social relations and understandings'".[12] Thus, under this view, jurisdictional authority may also emanate from non-state communities whose members can, but do not have to be, affiliated upon the basis of their geographical location.[13]

While this pluralist conception of jurisdiction aims at formulating a comprehensive theory of jurisdiction, others have examined the normative force of non-state communities in the specific context of the Internet. For example, Thomas Schultz points to what he perceives

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8 David G Post, "Governing Cyberspace: Law", (2007-8) 24 *Santa Clara Computer & High Technology Law Journal*, p 883.

9 *Ibid*., p 912.

10 *Ibid*. For an early criticism of the principles underlying this view, see, for example, Neil Weinstock Netanel, "Cyberspace and Self-Governance: A Sceptical View from Liberal Democratic Theory", (2000) 88 *California Law Review*, p 395.

11 See e.g. See Myriam Dunn, Sai Felicia Krishna-Hensel & Victor Mauer (eds), *The Resurgence of the State - Trends and Processes in Cyberspace Governance*, (Aldershot-Burlington VT, Ashgate Publishing, 2007).

12 Paul Schiff Berman, "The Globalization of Jurisdiction", (2002) 151 *University of Pennsylvania Law Review*, p 311, at 322, quoting Doreen B Massey, *Space, Place, And Gender*, (Cambridge, Polity Press, 1994), p 154.

13 See Adeno Addis, "Community and Jurisdictional Authority, in: Günther Handl, Joachim Zekoll, Peer Zumbansen (eds) "Beyond Territoriality" (Leiden, Boston, Martinus Nijhoff Publishers, 2012, pp 13 et seq.

as de-localised autonomous legal systems brought about by private ordering, particularly in a commercial Internet setting. Rather than depending on state power, these non-state online communities generate legal regimes consisting of primary and secondary rules in the Hartian sense[14] that form "nearly self-contained spheres of normativity, adopting their own rules, applying them in their own dispute resolution *fora* and ensuring [...] enforcement".[15] Others, too, recognise private governance mechanisms in cyberspace as sources for the creation of alternatives to state law.[16] As a prime example of the emergence of non-state law in cyberspace, the *eBay* trading platform is often cited. Specifically, *eBay*'s user policies, its outsourced online dispute resolution (ODR) mechanism and its reputation management system are said to represent all the ingredients necessary to form an independent legal system.[17] The user policies prescribing succinct rules of conduct do, indeed, resemble a "uniform law".[18] The ODR mechanism,[19] which was operated by "Square Trade" from 2000 until 2008, provided, among other things, software-assisted negotiation procedures and personal mediation services at low cost, and, in resolving a large number of disputes, appeared to present an effective alternative to the expensive state litigation systems.[20] The reputation management system consisting of reputation points and the award/removal of a trustmark can operate as a powerful incentive both to participate in the *eBay* dispute resolution procedure and abide by its outcome.[21]

The assumption that the interplay of these components transformed the *eBay* undertaking into an autonomous legal regime[22] is nonetheless questionable. It is patently untenable if the assumption rests on the assertion that *eBay* rules do not operate "within the limits and in the shadow of state law [but rather] appear to effect an overriding of mandatory [state] rules".[23] A quick look at *eBay*'s localised websites designed for various countries reveals the opposite, that is, that the company is well aware of the strictures of state laws and that it makes an effort to abide by these regulatory frameworks. The German website, for example, is crowded with references to state law requirements and court decisions.[24] One page addressing "*eBay-Grundsätze*" [*eBay* policies] states outright that "these policies reflect in part laws in

14 HLA Hart, *The Concept of Law*, 2nd ed., (Oxford, Oxford University Press, 1994).
15 Schultz, note 6 above, p 831.
16 See, for example, Gralf-Peter Calliess, "Transnational Consumer Law: Co-Regulation of B2C-E-CommerceCLPE", Research Paper Series 3/2007, available at: http://ssrn.com/abstractid=988612. The same in: Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code*, (Oxford-Portland OR, Hart Publishing, 2010), p 154 *et seq*.
17 Schultz, note 6 above, p 836 *et seq*; Calliess, note 16 above, p 4 *et seq*.
18 *Ibid*., Schultz and Calliess.
19 See generally on online dispute resolution, Julia Hörnle, *Cross-Border Internet Dispute Resolution*, (Cambridge, Cambridge University Press, 2009); Fred Galves, "Virtual Justice: Making the Resolution of E-Commerce Disputes more Convenient, Legitimate, Efficient, and Secure", (2009) *Journal of Law, Technology & Policy*, p 1.
20 Schultz, note 6 above, pp 836-837.
21 *Ibid*., p 837; Calliess, note 16 above, p 6 *et seq*; same as Calliess & Zumbansen, note 16, p 155.
22 See Schultz, note 6 above, p 837; Calliess, note 16 above, p 23.
23 See Schultz, note 6 above, p 836.
24 See http://pages.ebay.de/rechtsportal/index.html, last accessed 28 August 2013.

force which must be abided by […"].[25] *eBay* even relies on state laws to shield itself against liability claims.[26]

Equally difficult to sustain is the conclusion by some authors,[27] that the *eBay* user agreement, along with other company policies, is chief in regulating the behaviour of the participants. This agreement and its appendices hardly reflect the alleged existence of an autonomous legal system, but restates, in many instances, rules that are boilerplate norms in every developed state law system.[28]

On the other hand, there are exceptions that are actually capable of creating clashes between *eBay* user-expectations and state law. For example, the consumer's right to withdraw from a distance-selling transaction, as extended by the German Federal Supreme Court to consumers acquiring goods in the course of *eBay* auctions, imperils a core principle of the *eBay* system, which is to facilitate and finalise irrevocable transactions.[29] Despite *eBay*'s commitment to abide by applicable state law, it is conceivable that users will not invariably invoke their rights granted by state law if this were to frustrate core expectations of the *eBay* community and trigger negative reputation ratings.[30]

However, the fact that such reliance on state law before state courts did occur in this case, as well as in many others, is evidence of the continued influence of municipal law. Recently, for example, the German Federal Supreme Court was called upon to interpret the following

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[25] See http://pages.ebay.de/help/policies/overview.html. The American website is different and yet also recognises and relies strongly on state law requirements as evidenced by the following statement: "You will not ... violate any laws, third party rights or our policies." See http://pages.ebay.com/help/policies/user-agreement.html.

[26] "Accordingly, to the extent permitted by applicable law, we exclude all express or implied warranties, terms and conditions including, but not limited to, implied warranties of merchantability, fitness for a particular purpose, and non-infringement." Available at: http://pages.ebay.com/help/policies/user-agreement.html. Furthermore, eBay leaves no doubt as to which laws apply in disputes that do arise: "You agree that the laws of the State of Utah, without regard to principles of conflict of laws, will govern the User Agreement and any claim or dispute that has arisen or may arise between you and eBay, except as otherwise stated in the User Agreement." Available at: http://pages.ebay.com/help/policies/user-agreement.html.

[27] See Calliess, note 16 above, pp 21-22; same as Calliess & Zumbansen, note 16, p 165.

[28] See, for example, the following rules:
While using eBay sites, services, applications, and tools, you will not:
…
- use our sites, services, applications, or tools if you are not able to form legally binding contracts or are temporarily or indefinitely suspended from using our sites, services, applications, or tools;
- fail to deliver payment for items purchased by you, unless the seller has materially changed the item's description after you bid, a clear typographical error is made, or you cannot reach the seller;
- fail to deliver items purchased from you, unless the buyer fails to meet the posted terms, or you cannot reach the buyer;

For more see http://pages.ebay.com/help/policies/user-agreement.html.

[29] See Calliess, note 16 above, p 23, referring to Bundesgerichtshof, Decision of 3 November 2004 (VIII ZR 375/03).

[30] *Ibid*., p 24.

German *eBay* general contract term: "Members are generally liable for all activities which are carried out by using the membership account."[31] The Court held that this provision did not entitle a bidder to recover damages for the early withdrawal of an offer to sell certain items by auction, when that offer was not placed by the defendant-member account-holder herself, but by her husband who had acted without her knowledge and permission.[32] The court invoked, among other things, Section 307 para. 1 (1) of the German Civil Code) which renders a general contract term invalid if it disadvantages the other party to the contract in contravention of the principles of good faith and fair dealing.

Thus, while *eBay* is a largely self-policed entity with self-generated rules, these rules are subject to state-based interpretation, adjudication, enforcement or annulment. The extent of this influence may be debatable, but the claim "that [*eBay*] disputes are resolved according to a single set of transnational rules"[33] is unwarranted. These rules have several sources and those rules that emanate from private ordering will often operate in the shadow of municipal law. Not infrequently, the invocation of municipal law will lead to a restrictive interpretation of *eBay* norms or even entail their nullification.

Furthermore, it is unclear which, if any, rules are outcome-determinative in the bulk of all *eBay* disputes that do not end up in ODR-proceedings or in court. Since Square Trade ceased to offer ODR-services for *eBay* customers in 2008, *eBay* appears to have internalised the processing of consumer complaints through its in-house *eBay* Buyer Protection programme even more than it already did before.[34] In essence, this programme is a conflict prevention (rather than resolution) mechanism that relies heavily on the early, informal and direct communication between businesses and consumers. Millions of disputes have been prevented or settled in this way, *without* precedent-setting decisions and outside of formalised ODR-procedures such as those previously offered by Square Trade.[35] Predictability of outcome, believed by some to be an attribute of the *eBay* regime,[36] is certainly not a characteristic feature of this system.

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31 Section 2 No. 9 of the German eBay general contract terms.

32 Bundesgerichtshof, Decision of 11 May 2011 (VIII ZR 289/09).

33 Thomas Schultz, "Internet Disputes, Fairness in Arbitration and Transnationalism: A Reply to Julia Hörnle", (2011) 19 *International Journal of Law & Information Technology*, p 153, at 162.

34 As an alternative, eBay offers customers to avail themselves of the PayPal Buyer Protection programme; see http://pages.ebay.com/help/policies/buyer-protection.html#paypal.

35 See Pablo Cortés, "Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers", (2011) 19 *International Journal of Law & Information Technology*, p 1, at 7.

36 See, for example, Schultz, note 33 above, p 162. Equally unpersuasive is his claim that "[p]redictability is the most fundamental pursuit of the rule of law". *Ibid*., p 161. The rules of autocrats would likely meet this objective more easily than those of others. On the interplay of predictability and acceptability of law, see, for example, Elina Paunio, "Beyond Predictability - Reflections on Legal Certainty and the Discourse Theory of Law in the EU Legal Order", (2009) 10 *German Law Journal*, p 1469.

If, then, the metamorphosis of social and commercial rules into a system of binding norms cannot occur without mature "secondary rules",[37] then the totality of the above observations would suggest that the *eBay* regime is not an autonomous legal order. It is not vested with sufficient independence or the power to create (prescribe), adjudicate and enforce primary rules of obligation. That it functions to some extent, as a private "co-regulator" by filling legal gaps left by state legislatures,[38] does not justify a different assessment. Systemically, *eBay* is in no different position than other private actors embedded in state-run hierarchical systems which feature a large number of non-mandatory default rules. Such deference or delegation leading to more or less densely developed commercial practices or social standards does not *per se* transform them into (non-state) normative orders.[39]

The finding that the vast majority of conflicts are avoided or settled early on through direct negotiations between the participants also casts doubt on the assertion that *eBay* rules operate within a *transnational* legal regime. It is widely acknowledged today that e-commerce is essentially limited to intra-state transactions.[40] Language barriers and the lack of transparency that are characteristic of such transactions explain, in large part, the dearth of cross-border B2C (Business to Consumer) deals.[41] Diverging consumer protection laws, even within the European Union, impose further limits to an online trade without frontiers. Thus, the widespread inability to engage in meaningful cross-border communication, together with informational deficits and the perseverance of states enforcing their mandatory consumer-protection laws, constitute powerful obstacles to the emergence of a self-referential transnational legal regime.[42] In contrast, then, to those who view *eBay* as paradigm for transnationalism "in the sense that the location of buyers and sellers is almost meaningless",[43] borders do continue to matter, as do places with diverging expectations and norms, respectively expressed and enforced through different modes of communication. Localised websites reflecting these and

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37 As envisaged by those who rely on Hart's "Concept of Law", note 14 above. See, for example, Andreas Fischer-Lescano & Lars Viellechner, "Globaler Rechtspluralismus", (2010) 34-35 *Aus Politik und Zeitgeschichte*, p 20, at 23.

38 On the interaction of states and private actors in the internet environment, see Jeanne Pia Mifsud Bonnici, *Self-Regulation in Cyberspace*, (The Hague, Asser Press, 2008).

39 For an insightful account of the ways in which states (particularly through their choice-of-law regimes) address non-state normative orders - by rejection, incorporation, deference or delegation – see Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, (2005) 51 *Wayne Law Review*, p 1209, at 1227-1237.

40 See, for example, Cortés, note 35, p 2.

41 Expectations of market participants are another reason. See, for example, Jack Goldsmith & Tim Wu, *Who Controls the Internet, Illusions of a Borderless World*, (New York, Oxford University Press, 2006), p 51: "A Croatian who buys a Dell computer on the Web wants not only instructions he can understand but also the address and phone number of a local repair service, as well as a real-space return address, in case problems arise."

42 On the relevance of "meaningful communication" for social and legal systems, see Niklas Luhmann, "The Unity of the Legal System", in: Gunther Teubner (ed), *Autopoietic Law: A New Approach to Law and Society*, (Berlin-New York, Walter de Gruyter, 1988), p 17.

43 Schultz, note 33 above, p 162.

other differences, coupled with the ability to locate web-surfers in real space, and customised web-content that is adapted to that location,[44] lend further support to the conclusion that *eBay* has not produced a non-state transnational legal regime in cyberspace. Clearly, there is transnational law that governs certain subject-matter areas of electronic commerce. But these rules are public in nature; they are emanations of state or regional initiatives.[45] One recent example is the EU-Directive, adopted by the European Parliament in June 2011, which will require Internet businesses, among other things, to provide their customers with greater transparency about pricing and delivery terms.[46] The directive aims precisely at what partly under-regulated market forces have failed to achieve so far, that is, the increase of e-commerce across borders. Another illustration is the even more recent Regulation on consumer ODR[47] which addresses, among other things, consumer protection rights in online dispute resolution procedures. Article 5 of that Regulation highlights the European *public* interest in this area, by providing, *inter alia*, that the Commission shall develop an ODR platform and that this platform "shall be a single point of entry for consumers and traders seeking the out-of-court resolution of disputes covered by this Regulation."

The widespread absence of borderless, non-public cyberspace regimes notwithstanding, there is one Internet-associated undertaking, and its online dispute resolution mechanism, which may conceivably serve as evidence of a non-state transnational authority. This is the Internet Corporation for Assigned Names and Numbers (ICANN[48]) and its Uniform Domain Name Resolution Policy (UDRP[49]). The remainder of this paper will examine the extent to which the substantive and procedural rules governing this system have established a transnational non-state jurisdictional authority in cyberspace.

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44 See, for example, Goldsmith & Wu, note 41 above, pp 59-63.

45 See, for example, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) *OJ L 178, 17/07/2000 P. 0001 - 0016*. Article 3(1) of the Directive features a country-of-origin approach, which means that the service provider established in one member state must, in principle, only comply with the national provisions applicable in that state.

46 European Parliament legislative resolution of 23 June 2011 on the proposal for a directive of the European Parliament and of the Council on consumer rights (COM (2008)0614 – C6-0349/2008 – 2008/0196(COD)); available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+20110623+TOC+DOC+XML+V0//EN.

47 Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJL 165/1 (2013), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:165:0001:0012:EN:PDF.

48 http://www.icann.org/en/general/bylaws.htm.

49 http://www.icann.org/en/dndr/udrp/policy.htm.

III. ICANN and The UDRP

ICANN was formed in 1998 as a Californian non-profit public-benefit corporation. The mission of ICANN, whose foundation was the result of a compromise between the US Department of Commerce and several interest groups,[50] is "to co-ordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems."[51] Among other things, ICANN's specific tasks are to co-ordinate the allocation and assignment of "[d]omain names (forming a system referred to as DNS) and of the Internet protocol (IP) addresses and autonomous system (AS) numbers[52]". As DNS- and IP- regulator, ICANN exerts authority over core constitutive elements of the Internet as such. In other words, ICANN has control over the indispensable pre-requisites for the establishment and maintenance of any web presence. Not only does this authority have an enormous impact on valuable Internet-associated property rights, "it also has the potential to serve as a powerful tool of Internet enforcement and to shape the nature of the Internet itself".[53]

By adopting the Uniform Domain Name Resolution Policy on 24 October 1999, ICANN introduced an administrative online-procedure (as well as substantive rules) for the resolution of trademark disputes arising from so-called "cyber-squatting". This practice involves, in essence, the bad faith registration of a domain name which is similar to, or identical with, a trademark, with the intent to sell it back to the trademark-owner or to third parties.[54] Prior to the adoption of the UDRP, trademark-owners found it difficult to protect their rights against cyber-squatters. The international dimension of the disputes often posed insurmountable jurisdictional obstacles. In particular, the friction between the limited reach of domestic intel-

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50 On the genesis of ICANN and its early years, see, for example, Harold Feld, "Structured to Fail: ICANN and the 'Privatization' Experiment", in: Adam Thierer & Clyde Wayne Crews, Jr. (eds), *Who Rules The Net?: Internet Governance and Jurisdiction*, (Washington DC, The Cato Institute, 2003), p 333 *et seq*. For a fuller account, including the most recent developments, see A Michael Froomkin, "Almost Free: An Analysis of ICANN's 'Affirmation of Commitments'", (2011) 9 *Journal on Telecommunications & High Technology Law*, p 187.

51 See Article I Section 1 of the ICANN by-laws, as amended on 18 March 2011.

52 *Ibid*.

53 Goldsmith & Wu, note 41 above, p 31; ICANN has often been criticised for failing to include a representative range of relevant internet community actors and for perpetuating power structures through its powerful Board that is dominated by corporate and commercial interests of established trademark holders. Critics have also assailed ICANN's opaque ("Byzantine") governance structure. For early accounts of these legitimacy and transparency concerns, see for example, A Michael Froomkin, "Wrong Turn in Cyberspace, Using ICANN to Route Around the APA and the Constitution", (2000) 50 *Duke Law Journal*, p 17, at 24; Jochen von Bernstorff, "Democratic Global Internet Regulation? Governance Networks, International Law and the Shadow of Hegemony", (2003) 9 *European Law Journal*, p 511 *et seq*; a more recent account is provided by Christopher M Bruner, "State, Markets, and Gatekeepers: Public-Private Regulatory Regimes in an Era of Economic Globalization", (2008-2009) 30 *Michigan Journal of International Law*, p 125, at 154-157.

54 UDRP paras. 4 a and b.

lectual property laws and the ubiquity of Internet domain names worked against the owners of trademarks.[55]

It was the UDRP in conjunction with the Rules for Uniform Domain Name Dispute Resolution Policy (the UDRP Rules[56]) as a non-state tool designed to combat cyber-squatting, which inspired several observers, among them primarily legal pluralists, to conclude that they were witnessing the (re-) birth of transnational law without a state.[57] It has been argued in this context that Section 15 (a) of the UDRP Rules evinces the autonomous non-state law status of the ICANN regime.[58] Section 15 (a) provides that:

> "[a] Panel shall decide a complaint on the basis of the statements and documents submitted and in accordance with the Policy, these Rules and any rules and principles of law that it deems applicable."[59]

Abbreviated and (over-) simplified, one argument in favour of finding an independent normative order in this context reads as follows: because the cluster of decisional standards in Section 15 (a) signifies a secondary normative environment in the Hartian sense, and because the norms of that sphere serve as referential standards for the applicable primary rules embodied in the UDRP, ICANN dispute-resolution occurs within a self-contained, self-referential non-state legal regime,[60] vested with jurisdiction to prescribe rules (and modify them if deemed necessary), to adjudicate disputes and to enforce the results.[61]

Although there can be no doubt that ICANN's dispute-resolution mechanism operates in a transnational context, the categorical claim that it does so as an autonomous legal system requires, of course, additional evidence. Without more substantiation, it is, at least, as plausible

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55 See e.g. Nils Christian Ipsen, *Private Normenordnungen Als Transnationales Recht?*, (Berlin, Duncker & Humblot, 2009), p 116. This problem has recently drawn fresh attention following the introduction of new generic top-level domains (gTLDs) such as .business, .lawyer, .food, .software by ICANN in 2012/2013. In order to provide efficient protection for the new trademark owners, ICANN has adopted a series of new dispute resolution instruments, in particular a Uniform Rapid Suspension (URS) procedure similar to the UDRP and intended to complement its protection. See Uniform Rapid Suspension Procedure (as of March 1, 2013) and the Uniform Rapid Suspension Rules (as of June 28, 2013), available at http://newgtlds.icann.org/en/applicants/urs. URS allows trademark owners to temporarily prohibit the use of a registered domain to cyber-squatters and other unauthorized users and thus permits a fast, transnational and efficient remedy against trademark violations.

56 Originally as approved by ICANN on October 24, 1999, http://www.icann.org/en/udrp/udrp-rules-24oct99.htm; subsequently as approved by the ICANN Board of Directors on 30 October 2009, http://www.icann.org/en/dndr/udrp/uniform-rules.htm.

57 Schultz, note 33 above, p 162; Thomas Schultz, "Private Legal Systems: What Cyberspace Might Teach Legal Theorists", (2007) 10 *Yale Journal of Law & Technology*, p 151. Fischer-Lescano & Teubner, note 7 above, p 16 *et seq*; available at: http://www.velbrueck-wissenschaft.de/pdfs/2005_fischer-lescanoteubner.pdf.

58 Fischer-Lescano & Viellechner, note 37 above.

59 See note 56 above.

60 See Fischer-Lescano & Viellechner, note 37 above.

61 See Schultz, "Private Legal Systems: What Cyberspace Might Teach Legal Theorists", note 57 above, pp 173-186.

to characterise this mechanism as a hybrid arrangement of shared responsibilities between state action and private ordering.[62]

We will test these hypotheses by examining the institutional status and authority of ICANN as well as the sources and nature of the procedure and substantive rules that govern cyber-squatting conflicts. Concerning the former, ICANN's existence and authority depended for more than 10 years in large part on the Memorandum of Understanding (MOU) between the US Department of Commerce (DOC) and ICANN, as well as on other contractual arrangements, which stipulated the allocation of powers and obligations between the US Government and the private non-profit corporation.[63] The MOU was repeatedly amended and, in 2006, replaced by a Joint Project Agreement. While ICANN enjoyed significant freedom in its day-to-day operations since its inception, the shadow of governmental influence remained, particularly due to the DOC's power to terminate the contractual arrangement thereby obliterating ICANN. Considering this ultimate authority of one arm of the US Government to rein into its operations, ICANN could arguably be described as a dependent semi-private entity vested with powers that are derivative of the US government's own authority.[64]

Qualifying this assessment, however, other observers have pointed out that the emphasis on the governmental control potential would unduly distract from the *de facto* leeway and discretion ICANN enjoyed in developing a novel online dispute resolution system.[65] In a formal sense, furthermore, ICANN's independence from governmental oversight was significantly strengthened by signing an "Affirmation of Commitments" with the Department of Commerce in September of 2009.[66] The additional freedom gained is substantial for the Affirmation effectively removes the former existential threat of ICANN of being replaced by another entity, chosen by the US Government.[67] But what has been the effect of ICANN's status as quasi-private actor for the dispute-resolution procedure embodied in the UDRP?

This question cannot be answered without an examination of the genesis and operation of the UDRP's procedural and substantive rules. Contrary to what one might expect about the conception of these rules, their blueprint is not an emanation of private ordering but, rather,

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62 See, for example, Laurence R Helfer & Graeme B Dinwoodie, "Designing Non-national Systems: The Case of the Uniform Domain Name Dispute Resolution Policy", (2001) 43 *William & Mary Law Review*, p 141, at 149 (describing the UDRP as "system containing an amalgam of elements from three decision-making models–judicial, arbitral, and ministerial—[…] draw[ing] inspiration from international and national legal systems").

63 For details, see Froomkin, "Almost Free: An Analysis of ICANN's 'Affirmation of Commitments'", note 50 above, p 191.

64 See Bruner, note 53 above, p 125, at 156. On the relationship between normative orders and delegated powers, see Michaels, note 39 above, p 1234 *et seq*.

65 See Ipsen, note 55 above, p 118.

66 The Affirmation, which explicitly acknowledges ICANN as a private entity, recognizes the lapsing of the JPA, the central link between the Department of Commerce and ICANN. For an assessment of the importance of this step, see Froomkin, note 50 above, p 198 *et seq*.

67 *Ibid*., p 203.

a work product of WIPO, the World Intellectual Property Organisation, which is an agency of the United Nations with currently 184 member states. As stated on its website, "WIPO was established by the WIPO Convention in 1967 with a mandate from its Member States to promote the protection of IP throughout the world through cooperation among states and in collaboration with other international organisations".[68] In a White Paper that it issued in 1998, [69] the DOC requested WIPO to provide the then soon-to-be-founded ICANN with recommendations on how to deal with domestic and transnational trademark domain-name disputes. The White Paper was explicit about the narrow scope of the subject-matter jurisdiction of the new online dispute-resolution system. Rather than addressing the relationship between trademarks and domain names comprehensively, the system was to be restricted to controversies involving the specific categories of "abusive registrations", *i.e.*, cyber-squatting cases.[70] In response to the DOC's request, WIPO launched a multi-staged and virtually global consultative process to address the issues raised in the White Paper.[71] The process called for balanced input from governmental agencies, inter-governmental organisations, professional associations, corporations, and individuals.[72] Despite the claim to rely on geographically and ideologically even-handed advice, however, both the drafting processes within WIPO and the subsequent approval procedure by ICANN were perceived by many as lopsided, lacking adequate participation by a representative range of domestic and international private and public stakeholders. Critics have argued that these processes were, instead, geared towards strengthening the position of powerful IP right-owners.[73] Regardless of the extent to which this criticism is justified, it is important to note for our purposes that the ultimate adoption of the UDRP was grounded in an odd co-operation between public and private actors. WIPO, a creature of public international law, acting upon the request of a single government, the United States, produced a normative system with transnational ramifications to be considered for adoption by ICANN, a quasi-private Californian corporation. ICANN thus had the power to implement the WIPO draft, and it could exercise this power without consulting any other affected government.[74] Whether that meant, however, that, in the absence of "any meaningful international public participation[,] new substantive global private *rights*

68 http://www.wipo.int//about-wipo/en/what_is_wipo.html.

69 See Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (10 June 1998), available at: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi.

70 *Ibid*., reg 31747.

71 See Helfer & Dinwoodie, note 62 above, p 166.

72 *Ibid*; see, also, Peter K Yu, "Currents and Crossroads in the International Intellectual Property Regime", (2004) 38 *Loyola Law Review*, p 323, at 402.

73 See Helfer & Dinwoodie, note 62 above, p 170, at 181; Joachim von Bernstorff, "The Structural Limitations of Network Governance: ICANN as a Case in Point", in: Christian Joerges, Inger-Johanne Sand & Gunther Teubner, (eds), *Transnational Governance and Constitutionalism*, (Oxford–Portland OR, Hart Publishing, 2004), pp 272-273.

74 See Helfer & Dinwoodie, note 62 above, p 167.

have been created by ICANN",[75] is a different question that shifts the focus on the nature, operation and effects of the rules that ICANN adopted.

The UDRP applies on the basis of a chain adhesion contract system. ICANN accredits so-called domain name registrars which, in turn, are authorized to accept the applications of those who wish to be registered as domain name holders. To be accredited, the domain name registrars for Top-Level-Domains (.com and .org, *etc*.) must agree to include the UDRP into the registration agreements which they enter into with every applicant, i.e., every prospective domain name holder.[76]

With this agreement, the domain name holder is forced to submit to an online mandatory administrative proceeding if, according to Paragraph 4a UDRP, a complainant asserts to an ICANN-approved dispute-resolution service-provider[77] that:

> "(i) the domain name is identical or confusingly similar to a trademark or service mark in which the complainant has rights; and
> (ii) the domain name holder has no rights or legitimate interests in respect of the domain name; and
> (iii) the domain name has been registered and is being used in bad faith."

If the complainant can prove that each of these three elements are present, the Administrative Panel will issue an order, and address it to the registrar, to either cancel the domain name or transfer the registration of it to the complainant.[78] The online procedure, which, like arbitration, is operated by private personnel, is fast, cheap, and promising for trademark owners. The time between the filing and the panel's order is significantly shorter than the decision-making process in ordinary litigation.[79] The costs for the panel proceedings are extremely low,[80] and the success rate for trademark-owners is very high.[81] The registrar receiving the order from the online dispute-resolution provider implements it unless the domain name-holder challenges the panel decision by initiating a law suit within 10 business days after the registrar was informed about the decision by the dispute-resolution service provid-

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75 See Bernstorff, note 73, pp 272-273 (emphasis added).

76 See Section 3.8 of the Registrar Accreditation Agreement (21 May 2009): "During the Term of this Agreement, Registrar shall have in place a policy and procedures for resolution of disputes concerning Registered Names. Until different policies and procedures are established by ICANN under Section 4, Registrar shall comply with the Uniform Domain Name Dispute Resolution Policy identified on ICANN's website…" Available at: http://www.icann.org/en/registrars/ra-agreement-21may09-en.htm#3.

77 Currently approved are the following four entities: Asian Domain Name Dispute Resolution Centre, National Arbitration Forum, WIPO, The Czech Arbitration Court Arbitration Centre for Internet Disputes, Arab Center for Domain Name Dispute Resolution (ACDR); details at: http://www.icann.org/en/dndr/udrp/approved-providers.htm.

78 These are the only remedies available under the UDRP. See paragraph 4 i UDRP.

79 Sixty days in WIPO-based proceedings; http://www.wipo.int/amc/en/domains/guide/#b2.

80 For example, the lowest fees for the Czech Arbitration Court amount to only 500 Euros; http://www.adr.eu/arbitration_platform/fees.php

81 Complainants before the Czech Arbitration Court succeed in 82% of all cases; Marie Moravcova/Tereza Bartoskova, The Czech Arbitration Court, Domain-name Dispute, p 4; available at: http://www.effectius.com/yahoo_site_admin/assets/docs/Effectius_TheCzechArbitrationCourt_MarieMoravcova_Newsletter13.150122937.pdf.

er.[82] Implementing the order means that the registrar itself creates facts through electronic means. By using the electronic tools under its control, the registrar will directly effectuate the two available remedies - deletion or transfer of the domain name - without additional external or internal institutional approval or support. For the parties involved in the process up to this stage, the UDRP is a truly self-enforcing system. However, the results are by no means binding or irrevocable. Indeed, the UDRP procedure is not even the excusive means of adjudicating these disputes in the first place. Paragraph 4k of the UDRP contains the pertinent opening (saving?) clause. According to this provision, trademark-owners can avoid the UDRP proceedings altogether by litigating their claims in national courts, instead. Furthermore, Paragraph 4k permits either party that lost before the ICANN-approved panel to seek redress before a court of competent jurisdiction.

Considering these procedural and institutional features, it becomes clear that the contractually grounded UDRP-procedure resembles arbitration only at first glance. In addition to the higher costs and longer duration of arbitration proceedings, there are at least three significant differences. First, while the inclusion of traditional arbitration clauses is (ideally) the result of arm's length negotiations, the UDRP-procedure is a mandatory dispute resolution scheme leaving no choice to registrars and registrants but to accept it as a prerequisite to pursue their (business) interests. Second, unlike arbitration - and unlike state proceedings -, the UDRP features a powerful self-enforcing system, albeit a non-conclusive one. Third, unlike arbitration, the UDRP does not in principle establish a self-contained, exclusive adjudicatory regime as Paragraph 4k of the UDRP permits its circumvention by trademark owners and accords either party the right to appeal a panel decision.

Although these "appeals" apparently constitute an exception,[83] once invoked, they pose a real threat to UDRP decisions. Courts called upon to decide such cases have held that they are not at all bound by the decision rendered by the panel. For example, the US Court of Appeals for the Fourth Circuit in *Barcelona.com, Inc*. v *Excelentisimo Ayuntamiento de Barcelona* held that "any decision made by a panel under the UDRP is no more than an agreed-upon administration that is not given *any* deference under the [Federal Anti-Cyber-squatting Consumer Protection Act (ACPA)]"[84] Thus, at least in the United States, courts with ordinary jurisdiction will try such cases *de novo* in accordance with federal law. Indeed, Section 1114(2)

82 Paragraph 4 k UDRP.

83 See Laurence R Helfer, "Whither the UDRP: Autonomous, Americanized, or Cosmopolitan?", (2004) 12 *Cardozo Journal of International & Comparative Law*, p 493, at 495, (reporting that the number of national courts asked to review UDRP panel rulings has been extraordinarily small - 1.03%, or 73 out of 7,079 cases until 2003).

84 330 F. 3d 617, 626 (4th Cir. 2003); the court emphasized the difference between the UDRP rules and domestic legal remedies and standards by holding that "because a UDRP decision is susceptible of being grounded on principles foreign or hostile to American law, the ACPA authorises reversing a panel decision if such a result is called for by application of the Lanham Act."; see *ibid*; see, also, *Southern Co.* v *Dauben Inc.* 324 Fed. Appx. 309, 316 (5th Cir. 2009).

(D)(v) of the ACPA explicitly provides domain-name holders with an affirmative cause of action before federal courts to recover domain names which they lost in UDRP proceedings.[85]

Notwithstanding the lack of finality and exclusivity, the UDRP and the "jurisprudence" evolving under it undoubtedly do have an impact on this specific area of IP law. It is just difficult to assess the "weight" of this impact. Some observers have gone as far as to claim that the UDRP has become the international standard for the resolution of cyber-squatting conflicts.[86] Given the high volume of UDRP decisions, this assumption may not be too far-fetched. Two of the ICANN-approved dispute-resolution providers alone have respectively rendered more than 26,000 and 20,000[87] decisions, almost every one of which was published.[88] If, as it has been argued, panels increasingly rely on this emerging body of case "law" in deciding new disputes, the UDRP system may, indeed, have acquired "a common law-like capacity to generate norms".[89] This assumption pre-supposes, however, that there is sufficient coherence and consistency in applying previous holdings and reasoning to cases involving similar circumstances. Whether or not that is so in general, it certainly is not the case in all areas, as is evident, for example, from the different weight that panels attribute to free-speech rights in evaluating the legitimacy of using domain names as an expression of criticism.[90]

For other aspects of cyber-squatting, a more coherent evolution of case "law" may exist,[91] but this is difficult to prove. The sheer numbers of disputes decided by ICANN-approved panels may be indicative of a substantial demand for this dispute-resolution model, as does the decision by the European Commission to emulate it by adopting a Regulation "*laying down public policy rules concerning the implementation and functions of the .eu Top Level Domain and the principles governing registration*".[92] However, this success as a soft law transplant does

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85 Section 1114(2)(D)(v) reads as follows: "A domain name registrant whose domain name has been suspended, disabled, or transferred under a policy described under clause (ii)(II) may, upon notice to the mark owner, file a civil action to establish that the registration or use of the domain name by such registrant is not unlawful under this chapter. The court may grant injunctive relief to the domain name registrant, including the reactivation of the domain name or transfer of the domain name to the domain name registrant." See, also, *Sallen* v *Corinthians Licenciamentos LTDA*, 273 F.3d 14, 18 (1st Cir. 2001) (granting domain name registrants who have lost domain names under administrative panel decisions applying the UDRP an affirmative cause of action in federal court for a declaration of non-violation of the ACPA and for the return of the wrongfully transferred domain names.).

86 Graeme B Dinwoodie, "Trademarks and Territory: Detaching Trademark Law from the Nation State", (2004-2005) 41 *Houston Law Review*, p 885, at 936.

87 WIPO ADR Arbitration and Mediation Centre, available at: http://www.wipo.int/amc/en/domains/statistics/cases.jsp; last accessed 29 August 2013 The National Arbitration Forum, available at: http://domains.adrforum.com/rcontrol/resources/Fast%20Facts%202013.pdf; last accessed 29 August 2013.

88 The publication requirement is set out in paragraph 4 j UDRP and paragraph 16 b UDRP Rules

89 Dinwoodie, note 86 above, p 938.

90 Ipsen, note 55 above, p 124.

91 Calliess & Zumbansen, note 16 above, p 138.

92 Commission Regulation (EC) No 874/2004 of 28 April 2004, OJ L162, 40 (30 April 2004). In Article 21 (1), the Regulation almost literally reproduces the substantive standards of paragraph 4a of the UDRP. The procedural structure likewise closely tracks the UDRP model by providing for the finality of panel findings, unless the domain name holder appeals to a court of law within a certain period of time.

not say much about its status in relation to state law or about the alleged coherence and predictability of the UDRP regime. Nor is the volume of UDRP cases in or of itself proof of its relevance and autonomy. A meaningful assessment of its relative weight would require access to the data of court proceedings involving the same subject-matter issues in various state systems. Such pertinent, system-specific figures are unavailable.[93]

Notwithstanding the absence of conclusive data, a summary look at American court cases since 1999 does suggest that ICANN's dispute-resolution panels applying the UDRP actually operate as a viable alternative to court proceedings under domestic American law. This law is the Anti-cybersquatting Consumer Protection Act (ACPA) of November 1999,[94] which amended the Lanham Act[95] to establish a civil action for damages and injunctive relief against cyber-squatters. As observed above, since 1999, far more than 40,000 disputes have been decided under the UDRP. That number compares with only 597 decisions rendered by American courts applying the ACPA during the same period.[96] In addition to trademark-owners, this number of court cases includes suits by domain name registrants seeking declaratory judgments and the return of domain names which they lost in UDRP proceedings.[97] While not all UDRP proceedings involve complainants with rights under American Trademark law, many do so. The comparatively small number of American court decisions[98] is somewhat surprising as the ACPA remedies include the award of damages that are unavailable under the UDRP. Furthermore, and most remarkably, the usual problems of locating distant cyber-squatters and exercising adjudicatory jurisdiction over them do not exist under American law. Emulating a solution long adhered to in maritime law,[99] the American legislature included an *in rem* action against the domain-name *itself*, which is available if the trademark-owner is unable to establish personal jurisdiction of the domain-name user.[100] Given this extraordinary jurisdictional device with its built-in transnational reach, the low frequency of litigation in courts is all the more astonishing.

Although the small number of American court decisions does not include the rate of settled cases, both during the pre-litigation phase and after the complaint was filed, it is realistic to assume in light of the above observations that the UDRP has become the favourable

According to Article 22 No. 13, of the Regulation, that period is 30 days, rather than 10 days as provided for by the UDRP.

93 For a variety of statistical findings concerning, for example, the composition of panels and the potential for bias of panels, see Jay P Kesan & Andres A Gallo, "The Market for Private Dispute Resolution Services - An Empirical Re-Assessment of ICANN-UDRP Performance", (2004-2005) 11 *Michigan Telecommunications & Technology Law Review*, p 285.

94 15 USC § 1125 (d).

95 15 USC § 1111-1128.

96 A Westlaw search on 29 August 2013 yielded that number of decisions applying the ACPA.

97 As was the case in *Sallen* v *Corinthians Licenciamentos LTDA*, note 85 above.

98 For the very low rate of appeals to national courts see Helfer, note 83 above.

99 See Martin Davies, *Maritime Law, The Epitome of Transnational Legal Authority*, in: Günther Handl, Joachim Zekoll, Peer Zumbansen (eds) "Beyond Territoriality" (Leiden, Boston, Martinus Nijhoff Publishers, 2012, pp. 327 et seq.).

100 15 USC § 1125(d)(2).

forum for the solution of cyber-squatting conflicts in the United States. The system's high speed, low cost, its effective self-enforcement mechanism and the success rate have prompted most owners of American-registered trademarks with claims against domain-name users to proceed before an ICANN-approved panel, rather than an ordinary court of law.

The popularity of UDRP proceedings still does not *per se* validate the hypothesis expressed at the outset of this section[101] that UDRP operates as an autonomous, coherent body of transnational law. Certain doubts about this assumption have been voiced above,[102] by pointing to the diverging values which different panels attribute to free-speech concerns in domain-name disputes and by referring to the structural lack of jurisdictional exclusivity. Thus, decisions in UDRP proceedings can still depend in significant ways upon domestic law. Because the UDRP does not specifically define every outcome-determinative norm, panels are bound, to some extent, to invoke national law to fill the gaps.[103] This is so, for example, with regard to the determination of whether the alleged trademark-right exists in the first place - a question that is, of course, altogether outside the UDRP's jurisdiction - or whether the use of a trademark by the domain-name holder can be considered legitimate. Depending on their background, individual panels faced with the latter question might resort to familiar patterns prevailing in their "home" jurisdiction.[104] If this occurred regularly, it would preempt the evolution of a coherent transnational normative system. UDRP Rule 15a actually embodies the potential for such continued fragmentation by authorising panels to "decide a complaint […] in accordance with the Policy, these Rules and *any rules and principles of law that it deems applicable*". (emphasis added)

It is, nevertheless, just as conceivable that Rule 15a and the developing body of jurisprudence under the UDRP have produced the opposite trend, namely, the above-mentioned system-internal common law-like capacity to generate norms. Undertaken for purposes of this paper, a review of almost 200 WIPO panel-decisions rendered in 2010 actually tends to confirm this assumption.[105] Most of these decisions refer to, and appear to rely on, former rulings to corroborate the panels' holdings. Many decisions cite such previous case "law" extensively, thus suggesting the presence of an internal coherence and cohesion that is characteristic of systems developing norms upon the basis of precedent-setting decisions. To be sure, the research undertaken did not explore the degree of such system-building consistence in depth. It is, nonetheless, obvious that the panels responsible for the decisions were keenly aware of previous rulings. That many of these panels seize on the reasoning of previous panels and, in particular, that none of the decisions under review invoked state law or state court

101 See note 58 above and accompanying text.
102 See note 90 above and accompanying text.
103 See, for example, Helfer, note 83 above, p 496.
104 See Dinwoodie, note 86 above, p 937, footnote 214 citing to WIPO Case D99-0001 (para. 6), in which the panel interpreted the "use" requirement by explicitly referring to a definition given by an American Federal Court of Appeals.
105 Decisions D 2010-1400 – D 2010-1599, available at: http://www.wipo.int/amc/en/domains/decisionsx/list.jsp?prefix=D&year=2010&seq_min=1400&seq_max=1599.

decisions, is at least *prima facie* evidence of a gradually emerging, self-referential normative order. Lending further support to this finding is the fact that there are even cases in which a party's pleadings cite former panel decisions in an effort to improve its prospects.[106]

In the light of these findings, ICANN's UDRP does not just present an exceedingly successful new type of international dispute-resolution framework. Consisting of judicial, arbitral and ministerial components, which, in the aggregate, form an apparatus with jurisdiction to adjudicate and enforce, the UDRP is also a source for prescribing rules and developing them within its own sphere of application. And while none of these jurisdictional powers are formally exclusive - but are, instead, open to challenge and avoidance by recalcitrant parties and "hostile" state court decisions - the UDRP has, nonetheless, evolved into a transnational legal authority with little *de facto* state-side control and interference. In response, then, to the issue raised at the outset of this section,[107] the UDRP has clearly moved beyond the status of a mere hybrid arrangement of shared responsibilities between state action and private ordering that often is assumed to be characteristic of many transnational regimes in a variety of contexts. However, this quasi-autonomous regime appears to represent a unique phenomenon. Parallel developments in cyberspace are not discernible.

IV. Summary of Findings

Contrary to common expectations, commercial online activities have not produced a body of transnational non-state jurisdictional cyberlaw. The oft-cited example, and most plausible candidate for such a development, the online trading platform *eBay* neither represents an autonomous legal order, nor is its core of operations transnational. No different than other commercial undertakings, it operates with considerable latitude pushing, so to speak, the envelope of private autonomy within state-set limits. And those limits prevent *eBay*'s operations, including its dispute-resolution mechanisms, which occur primarily as *intra*-state activities, from germinating into anything more than the establishment of soft-law commercial practices with domestic, rather than cross-border, implications.

By contrast, ICANN's UDRP represents a case on its own. A product of division of labour between public and private forces, the UDRP has developed into a transnational online dispute-resolution forum with jurisdictional powers to prescribe, adjudicate and enforce, which are virtually unfettered by the municipal laws and institutions of any single nation state or treaty regime. To put things into perspective, however, one has to recall the limited substantive scope of the UDRP, and acknowledge its unique status in the online world. It regulates only a very narrow subset of IP law, the abusive registration of domain-names. Generated and

[106] *F. Hoffmann-LaRoche AG* v *Bo Chu*, Case No. D2010-1424, available at: http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2010-1424.

[107] See Fischer-Lescano & Viellechner, note 58 above and accompanying text.

shaped under the influence of trademark-owners, the UDRP may prove to be a near perfect instrument for the specific purpose for which it was created. It functions as a quasi-one-stop shop for the speedy vindication and enforcement of valuable trademark-ownership interests. The UDRP has remained a peculiarity, however. Developments leading to online dispute-resolution models of comparable jurisdictional "strength" have not (yet) occurred. Considering its idiosyncrasy, the claim that the UDRP is a paradigmatic example of the formation of a *lex digitalis*, is unsustainable or, at least, premature.